

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

75-7338

(42,304)

To be argued by
MURRAY L. LEWIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75—7338

LESLIE CANTY, JR.,

Plaintiff-Appellant,

against

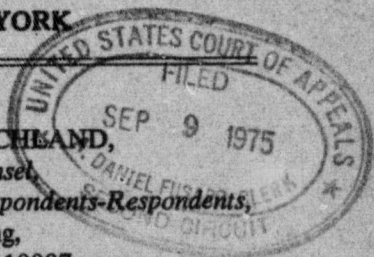
ELMER FLEMING et al.,

Defendants-Appellees.

BRIEF OF THE
APPELLEE POLICE DEPARTMENT
OF THE CITY OF NEW YORK

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ELMER FLEMING et al.,
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BRIEF OF THE APPELLEE POLICE DEPARTMENT OF THE CITY OF NEW YORK

Statement

Plaintiff appeals from an order of the United States District Court for the Southern District of New York (BONSAL, J.), entered on October 15, 1974, which dismissed the complaint. On October 23, 1974, plaintiff moved for reargument and for permission to serve a summons and complaint on an unserved defendant, Detective Elmer Fleming. On January 15, 1975, Judge Bonsal denied plaintiff's application in all respects. Thereafter, plaintiff moved for leave to appeal in *forma pauperis*, which application was granted on May 22, 1975; plaintiff was given 30 days to perfect his appeal. On the same day plaintiff filed his notice of appeal, but did not serve his brief until July 25, 1975.

Question Presented

Plaintiff alleges in his complaint that he has been deprived of certain constitutional guarantees in violation of the Civil Rights Law. He seeks in this action his purported damages. He names as defendants the State of New York, its Narcotic Addiction Control Commission, the New York City Police Department

and two individuals. He only served process on the State of New York and the Police Department. The District Court dismissed the complaint on the ground, among other reasons, that these governmental bodies were not "persons" within the meaning of 42 U. S. C. § 1983. The questions thus presented in this appeal are:

1. Was the complaint properly dismissed as against the State of New York and the Police Department of the City of New York?
2. Should plaintiff be given permission to serve a summons and complaint on Elmer Fleming?

Facts

Plaintiff had been appointed, on or about November 19, 1970, a probationary Narcotic Correction Officer, a State position. During his probationary period he was arrested by a New York City detective, defendant Elmer Fleming, and charged with, among other things, assaulting a police officer.

Plaintiff was represented by counsel on the criminal charges. Seemingly, as the result of plea bargaining, the charges were reduced to harassment, to which plaintiff pleaded guilty (Complaint, p. 2; plaintiff's affidavit sworn to October 23, 1974, p. 2). Plaintiff, despite his plea of guilty, alleges that the charges against him were unwarranted and made in bad faith.

Plaintiff avers that during the pendency of the criminal charges Detective Fleming advised plaintiff's superior of the pending charges. It is plaintiff's contention that as a result thereof he was fired from his employment and that such action constituted an arbitrary and capricious act in violation of his constitutional rights, which entitles him to the damages he seeks herein. Plaintiff's employment had been terminated on or about March 10, 1971.

The District Court dismissed the complaint against the Police Department (as well as New York State) on the ground that the court lacked jurisdiction to award damages as against

a municipality in a § 1983 (42 U. S. C.) action. Additionally, on plaintiff's application for reargument the court below, after denying the motion, pointed out that in any event the three year statute of limitations applies and that this action, which was commenced on June 24, 1974, was barred.

ARGUMENT

The Police Department of the City of New York is not a person within the meaning of 42 U. S. C. § 1983 and cannot be sued for damages under that section.

In any event, this action is barred by the statute of limitations.

(1)

Plaintiff is seeking monetary damages from the City of New York and others for their purported violation of his civil rights. The only defendants served with process were the Police Department and the State of New York.

It is submitted, that jurisdiction in this matter can only be derived from the Civil Rights Law as the complaint sets forth no other basis for jurisdiction. However, a municipality cannot be sued under that statute. Judge MacMahon in *La Rouché v. City of New York*, 369 F. Supp. 565 (S. D. N. Y., 1974), pointed out (pp. 566-567):

"The Supreme Court has held municipalities are not 'persons' within the meaning of 42 U. S. C. § 1983 and, therefore, may not be sued under that statute,¹ and that is true even if a plaintiff seeks only equitable relief.² Thus, plaintiffs have failed to state a § 1983 claim against the City of New York.

"Similarly, political subdivisions of a municipality or state, such as police departments, cannot be sued under § 1983."³ (Citing cases in footnotes.)

See also: *Zuckerman v. Appellate Division, Second Department, Supreme Court of the State of New York*, 421 F. 2d 625, 626

(2d Cir., 1970). But cf. *Brault v. Town of Milton*, pending on *en banc* reconsideration before this Court (Docket No. 74-2370).*

(2)

In any event, plaintiff's suit is time-barred. Plaintiff was fired on or about March 10, 1971. He commenced this action on June 24, 1971, more than three years after the accrual of the cause of action. As Judge Bonsal said below:

"This Court has no subject matter jurisdiction since plaintiff's claims, asserted under the Civil Rights Act of 1964, 42 U. S. C. § 1983, against each of these individuals, are time-barred by the applicable statute of limitations, N. Y. C. P. L. R. 214(2), which provides a three-year period within which to commence suits 'to recover upon a liability . . . created or imposed by statute.' *Romer v. Leary*, 425 F. 2d 186 (2d Cir. 1970). See *Ortiz v. LaVallee*, 442 F. 2d 912 (2d Cir. 1971)."

* Even if this suit otherwise came within the *Brault* panel decision, we would submit that the complaint would still be insufficient to establish federal jurisdiction for failure to allege actual damages of at least \$10,000.

CONCLUSION

The order appealed from should be affirmed.

September 3, 1975

Respectfully submitted,

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Police Department of
the City of New York

L. KEVIN SHERIDAN,
MURRAY L. LEWIS,
Of Counsel.

Pro se
AFFIDAVIT OF SERVICE ON ~~DEFENDANT~~ BY MAIL

State of New York, County of New York, ss.:

Carlos M. Rodriguez being duly sworn, says that on the 4 day
of Sept. 19 75, he served the annexed Brief of The Appellee Police upon
Leslie Canty, the attorney for the Pro se.
herein by depositing 3 copies of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the
United States in said city directed to the said Pro se. at No. 301 W 150 St. in the
Borough of MAN, City of New York, being the address within the State theretofore designated by
him for that purpose.

Sworn to before me, this

4 day of

Sept 19 75

Carlos M Rodriguez

Patrick J. Rooney

PATRICK J. ROONEY
Notary Public, State of New York
No. 8635600
Qualified in Bronx County
Term Expires March 30, 19

Form 323-50M-721047 (72) 346

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ATTORNEY GENERAL

James J. Lefkowitz
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